

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[illegible]

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE L. FELIPE RESTREPO
UNITED STATES DISTRICT JUDGE

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1 (The following was heard in open court at
2 10:05 a.m.)

3 THE COURT: How are you, sir?

4 MR. DUBROW: Good. Thank you.

5 THE COURT: Mr. Rucket.

6 MR. RUCKET: Good morning, Your Honor.

7 THE COURT: How are you? And Mr. -- is it
8 Keeley?

9 MR. KEELEY: Good morning, Your Honor.

10 THE COURT: How are you?

11 MR. KEELEY: Good. Thank you.

12 THE COURT: All right. This would be Mr.
13 Keller's motion to dismiss, is that correct?

14 MR. KELLER: That's correct, Your Honor.

15 THE COURT: Why don't we do this in order of
16 counts? All right. So let's just go count -- we'll
17 address Count 1 through Count 8. We'll start with Count
18 1. What's your argument on Count 1? I've read your
19 papers. What do you think I need -- what else do you
20 think I need to know, so to speak?

21 MR. KELLER: Well, Your Honor, may I raise a
22 threshold issue --

23 THE COURT: Sure.

24 MR. KELLER: -- before we get there? So,
25 there are multiple attorneys here from FIRE. They filed

1 a motion for leave to intervene that has not been ruled
2 upon.

3 THE COURT: Granted.

4 MR. KELLER: Okay. Therefore, I have not had
5 a chance to respond to their brief, substantively.

6 THE COURT: You can do it today.

7 MR. KELLER: Okay. Thank you, Your Honor.

8 THE COURT: All right. Go ahead.

9 MR. KELLER: On Count 1, the breach of
10 contract claim, Your Honor, the -- the gist of the
11 plaintiff's argument is this, I don't like your process;
12 I don't like the outcome. I'm a male, and therefore,
13 lots of things flow from those three facts.

14 THE COURT: What's your understanding of what
15 the -- what's the contract? My understanding, according
16 to the Complaint, it's the handbook.

17 MR. KELLER: The disciplinary proceeding set
18 for in the handbook, that's correct.

19 THE COURT: So is there a contract here?

20 MR. KELLER: Yes. We -- we don't disagree
21 that the --

22 THE COURT: So you do agree there is a
23 contract?

24 MR. KELLER: The disciplinary process, the
25 community standards process set forth in the handbook is

1 a contract, yes.

2 THE COURT: All right. So your argument is,
3 there was no breach of that contract --

4 MR. KELLER: Correct.

5 THE COURT: -- because the contract was
6 complied with, given the process that was exercised.

7 MR. KELLER: That's correct.

8 THE COURT: That's the essence of your
9 argument?

10 MR. KELLER: That's it, Your Honor. Yes, and
11 the -- the plaintiff's argument is, essentially, your --
12 your contract failed to have these things I think it
13 should have had.

14 THE COURT: Because they didn't like the
15 result.

16 MR. KELLER: Yes, that's different than you
17 did not comply with the contract.

18 THE COURT: All right.

19 MR. KELLER: That's the gist of the argument
20 on Count 1. I can go into more detail --

21 THE COURT: No, no. I get it.

22 MR. KELLER: -- but that's the heart of it.

23 THE COURT: I just wanted to make sure I
24 understand it.

25 MR. KELLER: Okay. Sure.

1 THE COURT: So let me hear from Mr. Dubrow on
2 Count 1.

3 MR. DUBROW: If Your Honor pleases, it seems
4 as if the argument advanced by the defendant is sour
5 grapes. We didn't like what happened, so therefore --

6 THE COURT: Right.

7 MR. DUBROW: -- we contend there's a breach of
8 contract. It is a rather detailed amended complaint
9 that was filed in this action. We went to great lengths
10 to show what the supposed contract revisions required
11 and how they failed.

12 Now, we can talk about specifics. We can talk
13 about the fact that, from the very simplistic one, that
14 a report of the investigation was to have been provided
15 to the accused before the hearing. A report was
16 provided to him, and then a supplemental report was
17 given to him, at the time of the hearing, which in my
18 view is, clearly, a breach of the contract.

19 There was a promise of an investigation, a
20 thorough investigation. What did we have? We had
21 review of hearsay statements from a woman in a bathroom.
22 We had an accusation that my client was intimidating to
23 an investigator who felt that he was going to be "beat
24 up". Your Honor, if you saw my client, he's about 98
25 pounds dripping wet, and comparisons to Jerry Sandusky,

1 but the most critical thing -- the most critical thing
2 is that -- the single most important piece of evidence
3 in this entire equation is the series and exchange of
4 text messages.

5 THE COURT: That were considered on remand, as
6 it were, right?

7 MR. DUBROW: Well, let's talk about that for a
8 second. Because in my view, that die was cast, because
9 you have to look at this case from its totality. We
10 have asserted not only did St. Joe breach it's contract
11 by failing to consider the most important exculpatory
12 evidence in this case, at the early stages of the
13 proceeding, at the initial hearing.

14 But if you take that juxtaposed with the
15 entire gender bias that St. Joe employs, by the time
16 that hearing was held and a finding made, without that
17 exculpatory evidence, and then it went up on appeal and
18 was remanded, in my view, the die was cast. They
19 weren't changing that verdict. The breach had already
20 occurred and the damage suffered.

21 So the mere fact that they conveniently say,
22 oh, oh, we did consider those text messages. We did
23 remand it. We did have a second hearing, but we
24 convicted you anyway, I think they -- there's a little
25 more that needs to be shown than simply connecting the

1 dots.

2 THE COURT: Let me ask you something.

3 MR. DUBROW: Yes, Your Honor.

4 THE COURT: If you take this argument to its
5 logical extreme, let's assume the result had gone the
6 other way, could Ms. Doe have said, hey, the contract's
7 been breached, because I don't like the result? Could
8 she?

9 MR. DUBROW: If she felt -- if she felt that
10 certain contractual obligations on the part of St. Joe,
11 as recited in the handbook, and let me give you a
12 footnote on the handbook for a second.

13 THE COURT: No, hold on.

14 MR. DUBROW: Okay. Well, let me --

15 THE COURT: I'm -- you know, here's the
16 question.

17 MR. DUBROW: Okay.

18 THE COURT: Could she have, then, complained,
19 if she didn't like the result?

20 MR. DUBROW: Absolutely. If she felt -- if
21 the result was predicated by a breach of the St. Joe
22 contract, including the implied covenant of good faith,
23 which was also pled, which is part and parcel of the
24 contract, but it's not a separate and distinct claim.
25 It's part and parcel of the contract.

1 If she felt that St. Joe did not honor its
2 duties and obligations under that contract, why couldn't
3 she sue? So this is not, simply, oh, the loser's asking
4 the Court to review what they did. It is the victim, in
5 my view, the plaintiff, who's been victimized, not only
6 by an inadequate procedure, but a procedure poorly
7 implemented, for a host of reasons, all articulated in
8 the amended complaint.

9 THE COURT: I get it. So that, at the end of
10 the day, then, under your matrix, the loser of the
11 hearing could go to Federal Court and say, hey, there's
12 a violation of the contract; I want to do this all over
13 again in Federal Court?

14 MR. DUBROW: No. What I'm saying is, if there
15 was a breach of the contract, he or she has the right to
16 the right. The case law allows it.

17 THE COURT: Well, if there was, but so if she
18 felt her rights were violated, she could go and -- she
19 could do the exact same thing that Mr. Harris has done?

20 MR. DUBROW: Well, when you say her rights
21 were violated, are you talking about --

22 THE COURT: The contract was violated.

23 MR. DUBROW: Yes.

24 THE COURT: Okay.

25 MR. DUBROW: Why not?

1 THE COURT: I just wanted to make sure I
2 understand that --

3 MR. DUBROW: Of course.

4 THE COURT: -- under your matrix, then, the
5 loser, as it were, in front of the community -- CSB,
6 right, Community Standards Board?

7 MR. DUBROW: Yes.

8 THE COURT: Could, then, come to Federal Court
9 and say, hey, my -- the contract was violated, I want a
10 hearing?

11 MR. DUBROW: Absolutely.

12 THE COURT: Okay. Okay.

13 MR. DUBROW: No different than any other
14 breach of contract claim.

15 THE COURT: Right.

16 MR. DUBROW: But let me just add, since --
17 since I'm here on that contract issue.

18 THE COURT: Hm-hmm.

19 MR. DUBROW: Yes, we plead, in the amended
20 complaint, that the handbook is a contract. St. Joe
21 insisted it's a contract. I am troubled, however, by
22 page three of the handbook that says it's not a
23 contract. And that fact, alone, creates a little bit of
24 a divot here, that alone, should defeat a motion to
25 dismiss, because I don't know what St. Joe means by that

1 reference. And if St. Joe is stating the position that
2 it's not a contract, I want to know what other things
3 St. Joe is relying upon.

4 THE COURT: Well, they're telling me it is a
5 contract, that's right? St. Joe's is not disputing this
6 a contract, Mr. Keller, right?

7 MR. KELLER: The disciplinary procedures set
8 for the Community Standards Procedures, in forma
9 contract. There are six or seven Pennsylvania cases
10 confirming that those procedures set for the contract.
11 The entire document, which, as we point out, it's got
12 maps; it's got class schedules, that -- the whole thing
13 is not a contract. But the disciplinary procedures set
14 forth in the handbook are a contract.

15 THE COURT: Are a contract.

16 MR. KELLER: Correct.

17 MR. DUBROW: It's not as clear, but if that's
18 the position, that's the position.

19 THE COURT: I told -- well, we're here now, so
20 that's St. Joe's position.

21 MR. DUBROW: That's St. Joe's position, and my
22 position is, is that's the contract upon I claim my
23 breach. However, I point out to the Court, it's an
24 involved -- it's included in a document that reads, this
25 is not a contract, just bringing it to the Court's

1 attention.

2 THE COURT: I get that, that the relevant
3 portion of this handbook is a contract. And St. Joseph
4 just told us as much.

5 MR. DUBROW: The relevant portion of this
6 handbook is a contract, as articulated by St. Joe, a
7 contract by adhesion, a contract that's take it or leave
8 it, a contract that St. Joe's drafted, a contract that
9 St. Joe's sought to implement, of course.

10 THE COURT: It was a contract. Okay. All
11 right. Does Mr. --

12 MR. KELLER: Your Honor, may I briefly
13 respond?

14 THE COURT: Sure. Yes.

15 MR. KELLER: Just to --

16 THE COURT: Well, let's go down -- straight
17 down --

18 MR. KELLER: Yes.

19 THE COURT: -- the aisle. Mr. Cohn, do you
20 weight in on this issue or not, the contract issue?

21 MR. COHN: No, Your Honor, we're only here to
22 argue over our motion, whether or not it be granted. Do
23 you need us?

24 THE COURT: Oh, so you're --

25 MR. COHN: So I think you've granted it.

1 THE COURT: You're done. Okay.

2 MR. COHN: So we're now -- now, we're here to
3 listen, and -- and --

4 THE COURT: All right. All right. I'm sorry,
5 Mr. Keller. Go ahead.

6 MR. RUCKET: Your Honor, if I may?

7 THE COURT: Go ahead.

8 MR. RUCKET: If I may, Dan Rucket, Your Honor.

9 THE COURT: Sure.

10 MR. RUCKET: We address this in our brief, as
11 well, but plaintiff is trying to have it both ways,
12 here, on the contract issue.

13 THE COURT: Now, Mr. Rucket, you represent
14 Jane Doe.

15 MR. RUCKET: I represent Jane Doe.

16 THE COURT: She's not sued in Count 1.

17 MR. RUCKET: No, but we have our own motion --

18 THE COURT: She's not sued in Count 1.

19 MR. RUCKET: -- to dismiss, which part --

20 THE COURT: But she's not a player in Count 1,
21 right? Count 1 is a breach of contract --

22 MR. RUCKET: Count 1 is not against her, but
23 it --

24 THE COURT: -- against St. Joseph's
25 University.

1 MR. RUCKET: Yes, Your Honor, but it goes to
2 the claims against her, because if the procedures are
3 found to have been properly followed, then they're --
4 then the finding against her, which we argue is binding
5 anyway, but if the procedures that St. Joe implemented
6 were properly followed, then that finding is conclusive,
7 no matter what, and there could be no claim against her,
8 because you can't relitigate that. So it --

9 THE COURT: Okay.

10 MR. RUCKET: -- does go to the claims against
11 her in our motion to dismiss, so if I could just weigh
12 in on the contract issue, which --

13 THE COURT: All right. Sure.

14 MR. RUCKET: -- we do address in our brief.
15 Plaintiff is trying to have it both ways here. They
16 allege a breach of contract. If you look at the amended
17 complaint, specifically, alleges a contract, in four
18 different paragraphs.

19 Particularly, if you look at paragraph 83,
20 they plead, "St. Joe's breached the contract by failing
21 to comply with the handbook, a contract between
22 plaintiff and St. Joe's University."

23 So they pled an actual contract, that the
24 handbook was a contract, but when faced with an argument
25 that St. Joe's actually did comply, now, all of a

1 sudden, it's ambiguous. It's confusing. It's a
2 contract of adhesion. They cannot have it both ways.
3 In order to prove a breach of contract claim, they must
4 have a contract, which they have pled is the handbook.

5 THE COURT: Okay. I'm sorry, Mr. Keller. Do
6 you want to respond to Mr. Dubrow's argument?

7 MR. KELLER: Thank you, Your Honor, yes, just
8 very briefly. So a few things are important. Some of
9 the words that you heard from plaintiff are the exact
10 problem with the plaintiff's complaint. You heard words
11 like, the guilty verdict, exculpatory evidence. The
12 plaintiff continues to confuse criminal process or even
13 civil litigation with an internal administrative
14 proceeding.

15 The St. Joe's handbook, which is incorporated
16 in the plaintiff's complaint, page 35 -- and this is
17 Exhibit A to our motion to dismiss -- says, "Community
18 Standards proceedings are not criminal or civil
19 proceedings, but rather, internal administrative
20 determinations of violations of institutional policy."

21 This is a Community Standards process, where
22 the St. Joseph's community decides whether, based on the
23 conduct alleged, the particular plaintiff is someone
24 they want to be a member of their community or not. If
25 not, for how long they feel like he should be suspended

1 from the community -- he or she. And Your Honor hit the
2 nail on the head, if in every case -- in every single
3 conduct case, every single conduct case, there's going
4 to be a complaining student and a responding student.

5 They're both going to be of some gender, one
6 way or the other. And if in every case, the unhappy
7 party gets to come to Federal court and say, I think you
8 breached the contract; I don't like the outcome, and by
9 the way, because I'm of a certain gender, male or
10 female, I think there was Title 9 discrimination, every
11 single internal disciplinary process is going to end up
12 in Federal court.

13 That's not what courts are here to do,
14 respectfully. There's case law in Pennsylvania, which
15 we cite, that states, "It has been said that courts are
16 reluctant to interfere in the disciplinary proceedings
17 of a private college, because they're internal
18 disciplinary proceedings where the college decides
19 whether someone has violated their community standards
20 or not."

21 Not whether they're guilty, beyond a
22 reasonable doubt, in a criminal proceedings, not whether
23 they're liable in a civil action. It's, have you
24 violated our community standards or not? And the
25 plaintiff's specific allegations of breach, we go

1 through each one, pages and pages, and say, they haven't
2 -- what they've pled, and this is what Twombly talks
3 about, "A court is not required to accept conclusory,
4 legal allegations cast in the form of factual
5 allegations, if those conclusions cannot reasonably be
6 drawn from the facts alleged."

7 That's what the plaintiff does. They say,
8 well, you failed to do this; you failed to do that. In
9 our motion to dismiss, we say, what's the factual
10 predicate for that? The plaintiff's reply doesn't
11 answer that all. They even move to a contract of
12 adhesion argument or a good faith argument.

13 They don't respond to the paragraph by
14 paragraph argument we make, explaining why each of their
15 allegations of breach, either isn't something based in
16 the contract. It's, I wish the contract said something
17 else or there's no factual predicate for it. You failed
18 to have proper procedures. Well, how? Explain what --
19 what in the contract.

20 And the things -- in fact, the things you
21 heard there, I don't think you considered the text
22 messages or I don't you considered them -- there's no
23 contractual requirement considering text messages one
24 way or the other or, geez, you can't consider it on
25 remand. These are -- the contractual requirements are

1 set forth in the handbook, as an internal administrative
2 proceeding. St. Joe's filed the internal administrative
3 proceeding, and the plaintiff doesn't like the outcome.

4 And Your Honor's right, that if in every case
5 where somebody doesn't like the outcome, they have a
6 breach of contract case, they have a Title 9 case, they
7 have a negligence case, we're going to be here all the
8 time, Your Honor, and that's not what courts are meant
9 to do, respectfully.

10 THE COURT: So at the end of the day, you're
11 telling me whatever due process was prescribed by the
12 handbook was complied with?

13 MR. KELLER: Yes, as pled. The plaintiff, in
14 paragraphs 44 to 66, goes through, in detail, all of the
15 procedures that were provided, and then says, but I
16 don't like it. I don't like the way it happened in my
17 case.

18 THE COURT: Right. Briefly.

19 MR. DUBROW: What's the expression, a few good
20 apples can ruin the bunch? We're not here about every
21 internal disciplinary proceeding that St. Joe's
22 conducted. We're here about one. We're here about one
23 that didn't go right, wasn't done right, wasn't followed
24 right, wasn't -- wasn't accomplished correctly. That's
25 what this case is all about.

1 We've articulated a basis for that. For the
2 Court to say, well, wait a minute, for me to allow this
3 case, am I opening up a floodgate? No. What the court
4 is saying is, there's 22 line-ups. They're all good,
5 except for one. Am I, now, going to open the door for
6 the other 21 line-ups? No.

7 You're going to look at this case. St. Joe
8 comes to us and says, wait a second. We have prescribed
9 these internal disciplinary procedures. We have
10 prescribed what is supposed to be done. We have
11 admittedly taken the bare bones, based upon this
12 infamous "dear colleague" letter, which FIRE can
13 address.

14 So they have knowingly taken the barest of
15 bones to allow for internal disciplinary procedure,
16 stripping the accused of any concept of fairness, let
17 alone due process. And while the courts do say, yes, we
18 show some deference, the internal procedures, the courts
19 also say that, the only caveat to this principle is that
20 the disciplinary procedures established by the
21 institution must be fundamentally fair.

22 Now, am I simply saying that these procedures
23 were not fundamentally fair because of the outcome? No,
24 I'm saying that these procedures were so unfundamentally
25 fair that this outcome was made the moment of

1 accusation. So if St. Joe or any other university is
2 going to prescribe and enact disciplinary procedures,
3 those procedures must be in compliance with applicable
4 law, and they must be implemented in accordance with the
5 contract, not simply because, well, we did this, as
6 again, what I said earlier.

7 Based upon the compelling evidence in this
8 case, simply saying we connected the dots just isn't
9 enough. And this plaintiff has the right to come into
10 this court and challenge the contract claim.

11 Thank you.

12 THE COURT: Thank you. With respect to the
13 Title 9 claim, Mr. Keller, Count 2?

14 MR. KELLER: Yes, Your Honor, well I would
15 circle back to what I just stated, which is, in
16 literally every disciplinary proceeding, there's a
17 complaining party. There's a responding party. They're
18 each of some gender, and the fact that there's an
19 outcome that one of them does not like, does not make a
20 Title 9 claim. It does not, so --

21 THE COURT: What about the Iqbal type argument
22 you made, with respect to Count 2? Did they satisfy
23 Iqbal, the pleading requirements?

24 MR. KELLER: No. No, they did not. And in
25 fact, they did exactly what Iqbal prohibits, and I can

1 tell you the paragraph -- I have it tabbed here. Hold
2 on one second. So here's the allegation -- it's
3 paragraph 92. "Evidence of St. Joe's impermissible
4 gender bias includes, but is not limited to, the
5 following."

6 Okay. So here's where they're going to tell
7 us how his gender impacted what St. Joe's did in an
8 impermissible way. Disregarding the text messages. And
9 in what does -- explain to us, please -- explain to us
10 why that's just not a conclusory allegation, the gender
11 influence of that. In what way? Did people say, we're
12 disregarding the text messages because you're a male.
13 In every case where there's a man, we disregard text
14 messages? Well, we would -- the hearing panel -- we
15 would consider these text messages, but because you're a
16 male, we won't.

17 Nothing close to that. It's a conclusory
18 statement of gender bias, followed by the same conduct
19 they complained about for the breach of contract count.
20 "Condoning Kalin's harsh and abusive attitude towards
21 Harris." Again, no allegation, no specific allegation,
22 beyond a conclusory statement that that has anything to
23 do with gender.

24 Failing to consider the text messages, again.
25 Remanding the case to the Board. Denying Harris the

1 right to confront and cross-examine his accusers. Those
2 specific -- and that's -- those are the specific
3 allegations. They say, see gender bias.

4 Not one of those allegations, not one, has any
5 specific allegation of how gender impacted those -- even
6 if those could form a Title 9 claim, and we, of course,
7 argue they couldn't -- there's no allegation of how
8 gender impacted anything that St. Joe's did, none, other
9 than a conclusory statement, under Twombly, based on
10 gender bias, things happened I didn't like. That's it,
11 Your Honor. There's not specific factual allegations of
12 how the things the plaintiff thinks were incorrect were
13 based on bias.

14 THE COURT: Mr. Dubrow, do you need more than
15 you pled?

16 MR. DUBROW: No, Your Honor.

17 THE COURT: Why not?

18 MR. DUBROW: Because Youssef tells me that
19 I've pled the correct -- the Youssef decision tells me
20 that what I've pled was sufficient, and even though
21 facts give rise to multiple claims, doesn't mean they're
22 mutually exclusive.

23 THE COURT: Was Youssef pre or post-Trumble?

24 MR. DUBROW: I believe Youssef was post-
25 Trumble.

1 THE COURT: Was it pre or post-Trumble?

2 MR. RUCKET: I think it was in '90s, Your
3 Honor.

4 MR. DUBROW: It's pre. It was in '90, I'm
5 sorry.

6 THE COURT: Way before Trumble.

7 MR. DUBROW: Yes.

8 THE COURT: So how can you -- how can you
9 suggest that --

10 MR. DUBROW: If it's Trumble --

11 THE COURT: -- Youssef does -- Trumble and
12 Youssef were different analysis, right?

13 MR. DUBROW: Yes, but what Trumble is telling
14 us is about the specificity. We aren't alleging
15 specificity. You want to talk about what gender bias
16 is? Let's see, a person is accused of having sexual
17 misconduct with a woman, and he's compared to a "male
18 child pedophile". Jerry Sandusky. That sound a little
19 gender biased? I think so.

20 The fact that the text messages, which is,
21 basically, the "booty call" from the girl, are omitted
22 from the record. That's not gender bias? What more do
23 we need to plead? We've pled sufficient facts that give
24 rise to an inference, and that's all we need to show, a
25 short and plain statement of facts, putting them on

1 notice to the defense, so they may prepare the defense.

2 We have shown that what St. Joe's did in this
3 instance was gender biased. We don't have to show every
4 aspect. That's what discovery is all about. This
5 simply gets us through the door, and we had pled
6 sufficiently, under Twombly or any other case. We have
7 alleged sufficient facts to show that there was
8 potential or not -- not actual gender bias employed
9 here.

10 THE COURT: Okay.

11 MR. KELLER: Your Honor, may I very, very
12 briefly?

13 THE COURT: Briefly.

14 MR. KELLER: I promise. So it's interesting
15 to me that the plaintiff cites to Youssef, because in
16 his reply, plaintiff says, Youssef is not binding upon
17 this Court. We, of course, think it is, but I just
18 found it interesting that they now rely upon Youssef.

19 THE COURT: Well, Youssef is, what, a Second
20 Circuit decision, right?

21 MR. KELLER: It is. That sets forth --

22 THE COURT: So is it binding on this Court?

23 MR. KELLER: It's the best analog to this type
24 of case.

25 THE COURT: Is it binding on this Court?

1 MR. KELLER: No.

2 THE COURT: All right.

3 MR. KELLER: No, there is no Third Circuit
4 case directly on point with a disciplinary proceeding.

5 THE COURT: I couldn't find any.

6 MR. KELLER: Nope, there's not. There's not,
7 Your Honor. It's been adopted by a number of other
8 circuits, but you're correct, there is not a binding
9 Third Circuit case. The other, briefly, what Iqbal says
10 is, "Determining whether a complaint states a plausible
11 claim for relief, will be a context-specific task that
12 requires the reviewing court to draw on its judicial
13 experience and common sense."

14 And I just wanted to mention that, because
15 what we're faced with, common sense applies when we're
16 making an analysis at the 12(b)6 stage. And what the
17 plaintiff has done, and in my view has confirmed they've
18 done, said things I didn't like happened, and I'm a
19 male, and that's enough to show gender bias under Title
20 9.

21 Common sense tells you that can't be right,
22 and -- and that's not the standard. There needs to be
23 some showing of how the gender impacted the outcome, a
24 pleading -- how the gender impacted the outcome or a
25 pleading as to how female students in this case, in the

1 same situation, are treated differently.

2 THE COURT: What about the reference to Mr.
3 Sandusky, suggesting that Mr. Harris was akin to Mr.
4 Sandusky.

5 MR. KELLER: I would argue, Your Honor, there
6 needs to be some pleading that says -- and you're just
7 like all those male pedophiles, like Sandusky. It -- it
8 -- one, frankly, it doesn't make sense.

9 THE COURT: Well, but I mean, I --

10 MR. KELLER: This is not -- this is not a
11 case --

12 THE COURT: -- understand Mr. Dubrow's
13 argument to be that, putting Sandusky's name into play,
14 everybody knows who -- at least around here -- knows who
15 Sandusky was and what he did. That's what I understand
16 Mr. Dubrow to be telling me, and you're telling me that
17 that's enough, that he had to elaborate on who Sandusky
18 was and what he did, and there's a correlation between
19 Mr. Harris' conduct and Mr. Sandusky's conduct?

20 MR. KELLER: I don't -- I guess I don't see,
21 Your Honor, how that reference, even accepting it is
22 true for current purposes, which, of course, we must,
23 why that's based on gender, as opposed to, maybe, a
24 really bad interrogation technique or it's fair to call
25 him a pedophile. That's really mean. Those things

1 might be true. But there's no -- it's not based on
2 gender. If the statement was something like, you're
3 just like all those men, like Sandusky, the way that you
4 treat women, something, which again, doesn't make sense,
5 because Sandusky was abusing males.

6 I mean, honestly, if we want to play it
7 through, and I know we're at the 12(b)6 stage, but I
8 don't see how that offhand statement in the course of an
9 investigation creates a gender bias that, in any way,
10 impacts the outcome.

11 THE COURT: Okay. With respect to Count 3,
12 the negligence. As I understand the claim, it's a
13 failure to train and failure to supervise, that there
14 was no training, no supervision of the -- of the folks
15 that comprised the CSB and of the investigators.

16 MR. KELLER: Yes, so, two arguments on that
17 point, Your Honor. One, we say in our motion, we're not
18 -- the plaintiff does not articulate what the duty is,
19 why we owe a duty to plaintiff to train people in a
20 particular way, in a way that he finds more appropriate?
21 And the plaintiff actually doesn't respond to that at
22 all in his reply.

23 He solely talks about just the Action
24 Doctrine. So, one, I'm not sure what the basis of the
25 duty is, but even if there is a duty, and again, the

1 plaintiff doesn't respond to that piece, I think the
2 gist of the Action Doctrine does apply here, because the
3 things that plaintiff says we did, we've been back and
4 forth on whether the plaintiff thinks there's a contract
5 or not, but now, if there is, the things he says we did
6 wrong, improper training, improper investigation and so
7 on, they're in his breach of contract count so it's one
8 or the other.

9 THE COURT: And, Mr. Dubrow?

10 MR. DUBROW: Well, given the fact that I had a
11 hand in drafting the opposition papers, I have to
12 respectfully disagree. We did take this -- we tackled
13 this issue head-on. What I find interesting is, on the
14 one hand, the defendant, St. Joe, takes the position
15 that we have not established a breach of contract claim,
16 but then says, you haven't established a negligence
17 claim because it's subsumed in the breach of contract
18 claim, which you haven't stated either.

19 It's difficult to have your cake and eat it,
20 too, in this instance. Well, let's talk about the
21 negligence issue. The core argument that was advanced
22 by St. Joe's had to do with the gist of the action, and
23 that's really separated, simplistically. One, we have
24 duties that we owe to one another, based upon the social
25 compact. I shouldn't hit you with my car. I shouldn't,

1 you know, have a crack in my sidewalk. There are no
2 contractual obligations. St. Joseph's University did
3 undertake a contractual obligation. The contractual
4 obligation was to establish the Community Standards
5 Board. The obligation was to establish a panel. The
6 obligation was to employ specific people to serve on the
7 panel and train them to do these things. Okay.

8 But their contract doesn't specifically say,
9 we're going to train them. We're just going to use
10 them. That's the contract claim. The duty to train and
11 employ appropriate people to carry out your duties and
12 responsibilities is separate and apart from the
13 contract, and that forms the basis of the negligence
14 claim, and that's why they're doing it.

15 THE COURT: All right.

16 MR. KELLER: Well, one -- one point, then,
17 Your Honor. And that's the issue we've raised is, we
18 would like to understand the source of the duty. Pages
19 26 to 27 of the plaintiff's brief --

20 THE COURT: I think the source of the duty, if
21 I understand Mr. Dubrow correctly, and if I don't, I'm
22 sure he'll correct me, is that once you have this
23 contract, you have a duty not to be negligent about the
24 way you go about doing your business.

25 Is that the essence of your claim, Mr. Dubrow?

1 MR. DUBROW: Yes, in a sense, but what it is,
2 is to say that, if you're going to undertake this
3 contract, you have now imposed upon yourself a duty to
4 carry out appropriately, not so much your contractual
5 obligations, but your training. And that's separate and
6 apart from contractual obligations.

7 THE COURT: Training of the folks --

8 MR. DUBROW: You train the right person to do
9 it.

10 THE COURT: -- training the folks that will
11 implement the contract, so to speak?

12 MR. DUBROW: Correct, and understand its terms
13 and also -- well, maybe even more, but it might come out
14 through discovery.

15 MR. KELLER: So responding to that, Your
16 Honor, again, if it's -- if the claim is based in the
17 contract, then again, we're back to the Gist of Action
18 Doctrine, which I think I heard. If it's, there's some
19 social duty, which the plaintiff does say in their
20 brief, pages 26 to 27.

21 We asked them for some authority about this
22 social duty concept, creating a duty to a particular
23 plaintiff to train their employees in a certain way.
24 There's no case cited. It's a statement, you assume the
25 social duty. We said, well, could you tell us the

1 source for that, so we can evaluate it. There's no case
2 citation.

3 MR. DUBROW: Well, actually, Your Honor, we
4 cited the Delhomme that addresses that issue. We
5 addressed -- we cited Bayview Loan Servicing, LLC versus
6 Law Firm of Richard M. Squire and Associates, that
7 addresses that issue. It talks about contractual
8 obligations and also, independent torts for negligent
9 training and hiring.

10 THE COURT: With respect to Count 4, the
11 unfair trade practices and the Consumer Protection Law.

12 Mr. Keller?

13 MR. KELLER: Your Honor, really, two pieces on
14 this. One, it's our position that there is one case
15 that the plaintiff cites where a community college was
16 held to be subject to the Unfair Trade Practices Act.
17 In that case, the thing the plaintiff -- so if you
18 accept the UTPCPL can apply to a private educational
19 institution, which I'm not aware of a case that said
20 that applies to a private school as opposed to a public
21 school, but let's say it could.

22 So two things. What's the thing you're
23 buying? The thing people were buying in the Beaver
24 County Community College case was, we bought this
25 degree. We're coming to school so we can get this

1 degree, and you fraudulently induced us to come, based
2 on that promise, because it turns out you can't grant us
3 that degree. The thing you pay tuition for is to get
4 the degree.

5 The idea, again, going back to the
6 plausibility of Twombly and Iqbal, the idea that what
7 the plaintiff purchased here, the service he purchased,
8 was a particular set of disciplinary policies is not
9 plausible on its face. It does not comport with common
10 sense. The thing that Mr. Harris purchased, if he
11 purchased anything that's subject to the UTPCPL, is the
12 right to work towards a degree.

13 That's what he paid his money for. The idea
14 that I paid -- I came to St. Joe's because I really
15 wanted a specific set of policies to apply, if I was
16 ever in -- in a student conduct proceeding. It just
17 makes no -- it -- it defies the common sense test. And
18 beyond that, there has to be reliance. So the fact is,
19 the policies that Mr. Harris challenges now and says,
20 we're inappropriate, and I -- I relied on, to my
21 detriment. He didn't know what those were until he
22 showed up.

23 He can't say, I paid my money. I applied to
24 St. Joe's because I wanted a certain set of policies,
25 when he didn't even know what those policies were until

1 he got here, so I think it should be dismissed on both
2 of those basis.

3 MR. DUBROW: Number one, what are the services
4 that he bought? He bought the right to go to college.
5 Now, yes, the end result of that is a degree. But does
6 St. Joe simply advertise itself as a college to get a
7 degree? No. It advertises itself to have students, to
8 have social interaction between the students, to have
9 sporting events, to have sporting -- intermural sports,
10 college sports, all types of things that a college
11 offers to somebody.

12 Also, St. Joe imposed upon its student body
13 its disciplinary procedures. They were part and parcel
14 of the sale. If you're going to buy our services to
15 obtain a degree, you're going to buy the conditions
16 preceding we're establishing for them.

17 So all -- it becomes all part and parcel of
18 the same sale. That's what St. Joe imposed. So
19 therefore, it does fall within the case cited, as -- as
20 being applicable to the act. The second issue about the
21 reliance is an interesting one. The handbook is given
22 to the student when he is accepted.

23 When you receive the letter in the mail saying
24 you're accepted at our college, you did not agree to
25 attend yet. You did not enroll. You may get one of 20

1 acceptance letters, and then make a decision. He
2 receives the acceptance letter. That's when the
3 handbook is provided. Then he subsequently enrolls. He
4 relies upon the handbook prior to his enrollment. That
5 satisfies the reliance requirement, under the Act.

6 THE COURT: Anything else?

7 MR. KELLER: Your Honor, all I would say is
8 that -- and I know the Court, obviously, will look at
9 the actual pleading. That's not how it's actually pled.
10 That's an argument today. But I don't think the UTPCPL
11 should apply for the reasons we stated, but also the way
12 it's pled is, I relied upon these representations and
13 warranties about your procedures in coming to St. Joe's.
14 It just -- temporally, it doesn't make sense.

15 THE COURT: And, Mr. Rucket, I'm sorry, but
16 I'm assuming you're joining in these arguments, unless I
17 hear otherwise, is that correct?

18 MR. RUCKET: Yes, Your Honor.

19 THE COURT: All right. So let's talk about
20 Count 5, the defamation claim, and this is Harris versus
21 St. Joe's, Doe and Kalin.

22 MR. KELLER: Your Honor, for St. Joe's and for
23 Kalin. What the plaintiff complains about, as you
24 repeated, allegations, as pled, or allegations that --
25 that I -- Harris engaged in sexual assault, and you

1 repeated those to people. One, that's true, there were
2 allegations that Harris was engaged in sexual
3 misconduct. That's true. There were. So I --

4 THE COURT: Well, when you say it was true,
5 that there were allegations, not --

6 MR. KELLER: That there were allegations --

7 THE COURT: -- not the voracity of the
8 allegations?

9 MR. KELLER: Correct, that there were
10 allegations.

11 THE COURT: Okay.

12 MR. KELLER: And that people, in conducting an
13 investigation, which Mr. Harris says we have to conduct,
14 quite stridently, repeated those allegations. I'm not
15 sure how any institution, higher education or otherwise,
16 is supposed to conduct an investigation if you can't
17 tell people what the allegations are.

18 So it's true, in the course of conducting an
19 investigation, what is it you're investigating? Well,
20 it's alleged that Mr. Harris engaged in sexual
21 misconduct. It's alleged he engaged in sexual assault.
22 That's true. Those -- but those statements were true.
23 That did happen. Those statements were true.

24 Secondly, we think there is a common interest
25 privilege which should apply here. The communication of

1 these statements were all within St. Joe's in the course
2 of conducting an investigation. There were statements
3 made to students, for the purposes of an investigation.
4 There were statements made among administrative for
5 purposes of an investigation.

6 And the Common Interest Privilege, we believe,
7 should make those, in this particular situation, should
8 make those communications privileged, because they were
9 serving an important interest. They were not
10 communicated to the public at large, and they were
11 serving a common interest, namely, to try to figure out
12 what happened.

13 And last but not least, for a defamation
14 count, and there are other points in our brief, but you
15 do have to plead a particularized injury from the
16 alleged defamatory comment, and we don't think the
17 plaintiff has done so, in this case.

18 THE COURT: Do you want to add anything, on
19 behalf of Ms. Doe?

20 MR. RUCKET: Yes, Your Honor, on our motion to
21 dismiss on the defamation count, actually, our primary
22 argument in this case goes to all the counts against my
23 client, including defamation.

24 Your Honor, one in five college women will be
25 sexually assaulted through their years in college. Date

1 rapes constitute about 42 percent of sexual assaults,
2 and they are the most under reported acts of sexual
3 assault on college campuses. This is a situation where
4 my client was date raped by Mr. Harris.

5 They rely on these, what they called today, a
6 "booty call", which are flirtatious emails hours
7 beforehand, which plaintiff contends -- nowhere in there
8 does it say sex or sexual intercourse -- but plaintiff
9 contends gave him a right for hours thereafter to do
10 whatever he wanted, because he had some emails that had
11 some flirtatious comments in there.

12 That is just not the way the world works
13 today, and the context of this case, my client was date
14 raped. She reported it, as the handbook requires. She
15 went to the hearing, as the handbook requires. She went
16 to a second hearing. And the finding, twice, was that
17 she was sexually assaulted by the plaintiff.

18 He has now filed this lawsuit in Federal
19 Court. And we've cited numerous cases, and the
20 plaintiff has cited nothing to contradict them, that
21 says, that you cannot relitigate the underlying finding
22 of the Administrative Board. I know we went through
23 this earlier, but I'd just like to reiterate that.

24 You cannot have a second bite at the apple as
25 to the decision of whether it occurred. The Courts are

1 not here to relitigate that. It's not the province of
2 the jury to go and redecide the underlying case.
3 Otherwise, every single administrative hearing would be
4 rendered worthless. All anybody would have to do is
5 say, we don't like the decision. Let's go to Court, and
6 we'll get 12 -- eight or 12 jurors to go and redecide it
7 for us.

8 So in the context of this case, the way that
9 it has been pled against St. Joe's and my client, they
10 can challenge the hearing itself and whether it was done
11 properly. And I agree. And I join in St. Joe's
12 argument that it was properly conducted. They cannot
13 relitigate the underlying finding that the sexual
14 assault occurred.

15 All of the counts against my client,
16 defamation, infliction of emotional distress, they're
17 all relying on that single finding that this event
18 occurred. If it didn't occur or -- that it did not
19 occur. If it -- the sexual assault occurred, as the
20 Hearing Board found, there can be no defamation. There
21 can be no infliction of emotional distress. There can
22 be no interference with contract.

23 So in this case, they are bound by that
24 conclusion, and they cannot relitigate that. So we
25 submit, Your Honor, that all of those -- all claims

1 against my client have to fail. You can't get up there
2 in front of a jury and argue it didn't happen, when it's
3 been found that it did, and that it's binding on him in
4 this lawsuit.

5 THE COURT: What about your immunity
6 arguments?

7 MR. RUCKET: Quasi-immunity -- immunity
8 because of quasi-judicial privilege, Your Honor, the
9 Schanne case held in Pennsylvania substantive law, that
10 a school administrative hearing can be a quasi-judicial
11 proceeding. There was a Loudermill hearing. That was a
12 special type of hearing, but it did not convert the
13 school into a government entity, as they argue from the
14 Schanne case that it should.

15 It did not convert it into some type of
16 government function. It's still a school, still holding
17 a school function, and we believe that the Schanne case
18 explicitly holds that a school can be considered quasi-
19 judicial -- have a -- is a quasi-judicial function.

20 In this case, absolute immunity would apply.
21 I talked in my brief about the public policy in that,
22 and as I started out, you want women to come forward
23 when they've been sexually assaulted. It is the most
24 under reported crime. There's a series of lawsuits out
25 there right now, across the country where colleges are

1 being accused of not doing the investigation and not
2 protecting women from sexual assaults.

3 If women are afraid that if they come forward,
4 they're going to be sued in Federal Court. When the
5 process finds that they have been sexually assaulted or
6 they're afraid to bring it up, that really hinders their
7 ability to come forward.

8 So the public policy, really, mandates a
9 privilege in coming forward to allow the claims to be
10 adjudicated in whatever form. In this case, it was with
11 the administrative hearing, the CSB, pursuant to the
12 handbook at St. Joe's.

13 THE COURT: So in short, as I understand your
14 argument, every statement she made to anybody of
15 authority, including her -- the person is identified by
16 initials, O-something.

17 MR. RUCKET: O.T. -- O.T.

18 THE COURT: O.T. All of those statement would
19 be covered by the immunity?

20 MR. RUCKET: Well in Schanne case, any
21 statement that leads --

22 THE COURT: No, no. In this case, that's what
23 your position is, right?

24 MR. RUCKET: Yes, yes. And it --

25 THE COURT: So she has immunity from covering

1 all of those statements.

2 MR. RUCKET: Yeah, I mean, you're in the
3 bathroom. Your friend comes forward, what's wrong, and
4 you tell her, you know, I was intimidated into having
5 sex, and that leads to her saying, we're reporting this,
6 that leads to the administrative hearing, and under
7 Schanne, that is covered by the immunity.

8 THE COURT: Okay. Mr. Keller, do you want to
9 add anything to the immunity argument?

10 MR. KELLER: Not at this time, Your Honor.

11 THE COURT: Okay. Mr. Dubrow, on both
12 arguments?

13 MR. DUBROW: Your Honor, I find it
14 fascinating, in a motion to dismiss, the defendants are
15 talking about studies. Again, I don't know what these
16 studies are. I don't know what these studies are based
17 upon. I don't know what the facts of the studies are.
18 We're not talking about sexual assaults on campuses as a
19 whole. We're talking about one accusation of sexual
20 assault by a woman.

21 Now, what I also find --

22 THE COURT: How do you distinguish this case
23 from Schanne?

24 MR. DUBROW: Very simply, this, this was not a
25 quasi-judicial proceeding. This was an internal

1 proceeding by a university that involved no government
2 participation. Due process wasn't followed.
3 Fundamental Failures wasn't followed. No stenographer.
4 No record. Nothing. Even their own policies say that
5 we destroy all these records.

6 How could you have any type of quasi or
7 judicial immunity attaching to any such proceedings?
8 But let's go one step further, Your Honor. Talk about
9 what the -- the plaintiff claims happened here. First
10 of all, as we point out, in our opposition to the Doe
11 motion to dismiss, the Doe motion to dismiss is not a
12 motion to dismiss. It's an answer. The first four
13 pages are chock full of her version of the incident.

14 And then, after you read four pages of her
15 version of the incident, adds an oh, by the way. For
16 purposes of the motion to dismiss, however, you should
17 accept what the plaintiff has to say as true. Now, you
18 can take spins any which way you want on these text
19 messages. I refer to it as a "booty call". He refers
20 to it as a flirtation. I refer to it as evidence,
21 specific evidence that was excluded from this record.

22 Now, let's go back to the issue about
23 immunity. There is no immunity. There is absolutely no
24 immunity. And the fall-back position, and the -- and
25 the best evidence of this is, look at St. Joe's surreply

1 -- or reply, to our brief. They abandon the immunity
2 issue. What they say is, no, Judge, what you need to
3 look at is, truth is the defense.

4 THE COURT: Well, that's St. Joe's position.
5 I understand that.

6 MR. DUBROW: Truth is the defense. That was
7 the Doe position. Oh, wait a minute, I accused him of
8 sexual assault. It was true. I mean, what is
9 defamation? Defamation is a statement that's untrue
10 about somebody that injures his character.

11 THE COURT: When do you apply that, in this --
12 in this context of --

13 MR. DUBROW: There would be no immunity.

14 THE COURT: -- ever, in a college setting?

15 MR. DUBROW: If they -- wait a second. If, in
16 fact, they turned a college setting into a more
17 fundamentally sound process. If there was due process;
18 if there was an issue of record; if students were
19 permitted to be represented by counsel, even have their
20 parents present; if there was adherence as to
21 confronting one's accuser.

22 You can't have a Kangaroo Court, and then
23 throw the cloak of immunity over it.

24 THE COURT: But then, so is the woman that is
25 telling people that I've been violated --

1 MR. DUBROW: Yes.

2 THE COURT: -- she would have to know all of
3 this in advance, before she could make the decision to
4 report? In other words, she'd have to know, well,
5 there's immunity here, because there's a process down
6 the line?

7 MR. DUBROW: What stops -- you know, a woman
8 goes to the police, which conveniently --

9 THE COURT: Right.

10 MR. DUBROW: -- she never did. A woman goes
11 to the police and says, this guy, here, raped me. He
12 assaulted me. Well, they don't just have her in a room,
13 bring him in a room. What does she say; what does he
14 say. We're convicting you. No, it doesn't work that
15 way.

16 We have an investigation. We have probable
17 cause. We have an arrest. We have a preliminary
18 hearing. We have a trial. We have a process, which is
19 called the judicial process. That's where immunity
20 applies.

21 But if you're going to have a flimsy
22 procedure, a procedure that affords absolutely no rights
23 to the accused. And you know, we come back to the issue
24 of that bare bones argument that I made earlier, not
25 confronting one's accuser, no right to counsel, allowing

1 in hearsay testimony. Where does St. Joe say that this
2 is -- well, what does St. Joe hide behind this, upon
3 this "dear colleague" letter, which FIRE addresses, and
4 which the law is going to demonstrate, does not give St.
5 Joe that right.

6 What Jane -- St. Joe's procedures were legally
7 insufficient. So now, you're going to have this clearly
8 insufficient process, and say, we're going to cloak it
9 with immunity, because we're concerned that you women
10 out there are not coming forward and alleging when you
11 have been -- or complaining when you have been assaulted
12 or the victim of some sort of sexual crime from another
13 student.

14 So we're going to relax the standards to such,
15 almost to the point where this preponderance of the
16 evidence standards, more seem towards presumption of
17 guilt on the part of the accused, and then, cloak it
18 with immunity. No, Your Honor, that's not what the case
19 law tells us.

20 THE COURT: Well, distinguish this case. What
21 due process was afforded in Schanne that wasn't afforded
22 -- how do you distinguish Schanne from the -- what
23 happened in this case?

24 MR. DUBROW: There was no due process afforded
25 in this case, Your Honor.

1 THE COURT: What was afforded in Schanne?

2 MR. DUBROW: I don't --

3 THE COURT: Distinguish it from this case.

4 MR. DUBROW: I don't know. I don't have it in
5 front of me.

6 THE COURT: Schanne was the case with Lower
7 Merion student and the teacher. And the teacher had a
8 sexual relationship with a student. And then the
9 student graduated, eventually came back home, as I
10 understand it, expressed some concerns about this
11 previous sexual relationship, and it was reported to the
12 -- the student reported it to her neighbor. Her
13 neighbor was also a teacher at Lower Merion.

14 MR. DUBROW: Right.

15 THE COURT: And as a result of that
16 conversation with the teacher, there was administrative
17 proceedings brought against the -- the chemistry
18 professor.

19 MR. DUBROW: The teacher, yes.

20 THE COURT: So where was -- where's the due
21 process that distinguishes the two sets of facts?

22 MR. DUBROW: Because I don't know -- I
23 don't --

24 THE COURT: That's a very -- well, summary of
25 Schanne.

1 MR. DUBROW: But I don't know what due process
2 was afforded the teacher under the process.

3 THE COURT: I'm asking you to distinguish the
4 two. Am I bound by Schanne.

5 MR. DUBROW: No, Your Honor, you're only bound
6 by whether or not you find that the process that was
7 afforded qualifies for judicial or quasi-judicial
8 immunity. And we've cited a series of cases that
9 demonstrated that it does not.

10 THE COURT: But there's a case from our
11 district that --

12 MR. DUBROW: If the -- if you say -- if you
13 can compare the two basis of due process, you could say
14 that the due process afforded to this professor or to
15 this -- to the teacher was immeasurable with the due
16 process that was afforded to Mr. Harris, which I submit
17 was not, because it was afforded no process. Now, why
18 should he be entitled -- why should St. Joe, with a
19 complaint, be entitled to judicial immunity? Because
20 the process wasn't the same.

21 Plus, the issue about communication. Do they
22 ignore the allegation in the complaint that -- that
23 says, at paragraph 73, "As the second semester of the
24 freshman year is about to begin, the Appeal Board still
25 has not ruled upon the panel's finding in Harris, who is

1 hesitant to return to St. Joseph's University, in light
2 of the, then, pending suspension."

3 What did St. Joe want to do at that point? I
4 can submit to that, Your Honor. I was involved in that.
5 They wanted to put him in select housing. They didn't
6 want to put him in a dormitory. They would have
7 stripped him of all privileges.

8 They wanted to just allow him to go to class
9 and come back to whatever cot they were going to confine
10 him to. Are you going to tell me this wasn't
11 communicated to other people? And so you go to the
12 fall-back argument employed by St. Joe and, even, Doe.
13 Oh, what about the truth defense? What truth? The
14 tainted truth? This truth that's the product of this
15 ridiculous Kangaroo Court disciplinary proceeding?
16 That's the truth?

17 THE COURT: Well, what do you make of
18 counsel's argument that a jury, as it were in this case,
19 can't revisit the result of the disciplinary hearing?

20 MR. DUBROW: We're not revisiting the result
21 of the disciplinary hearing. We're visiting, for the
22 first time, the disciplinary process, itself, because,
23 you know, if you say to me, well, look, I had this -- I
24 had this hearing, and the hearing produced a result. So
25 we're now bound by the result. Wait a second. Your

1 hearing didn't allow A. Your hearing, it didn't allow
2 B. Your hearing didn't allow C. Your hearing didn't
3 allow D.

4 And someone says, wait a second, that hearing
5 process was flawed or that hearing process was not
6 implemented, as agreed. The result is not the issue.
7 It's the process. What St. Joe's and Doe take the
8 position as, that we are upset with the result. I'm not
9 here complaining about the result. I'm complaining
10 about the process. The result follows the faulty
11 process. Had this process been implemented correctly --
12 established correctly and implemented to its core, you
13 would not have gotten this result. You would not have
14 gotten it. It is incredibly simple.

15 THE COURT: Wait, wait. You said this process
16 plus, right? This --

17 MR. DUBROW: This process plus, what?

18 THE COURT: You're saying, if this process had
19 been implemented correctly, but you're also suggesting
20 this process should have included the right to cross
21 witnesses, the right to confront --

22 MR. DUBROW: Correct.

23 THE COURT: -- your accuser, the right to
24 certain processes that are more akin to a criminal
25 trial.

1 MR. DUBROW: No, not so much through a
2 criminal trial, but something more than what they
3 offered, and that's where they come back to this "dear
4 colleague" letter. It says wait a minute. There was an
5 edict from the Government. We employed the bare bones,
6 as I said before. FIRE comes forward and says, wait a
7 second, that "dear colleague" letter doesn't have that
8 type of legal import. You, St. Joe, were required to
9 offer more to your accused.

10 So therefore, one of my positions is that, the
11 policy and the -- and the procedures, as established,
12 were flawed. Then, to the extent that they were not
13 flawed or they were established, they weren't
14 implemented properly, and that there -- there was this
15 infiltration of gender bias.

16 There was this -- you know, it's interesting.
17 Listen to the Doe argument. Well, there's this greater
18 concern that women don't come forward. What are we
19 hearing? We're hearing the underlying to this policy
20 and procedure.

21 We want to favor the woman. We want to favor
22 the accuser. That sounds like gender bias to me. We
23 want to have a policy and procedure that does afford the
24 accused any type of process, any type of fundamental
25 fairness. And then we want to say, oh, by the way, if

1 you want to complain about it, you can't, and we're
2 immune.

3 MR. RUCKET: Well, if I may --

4 MR. DUBROW: Defeats the history of this juris
5 prudence.

6 THE COURT: Sure.

7 MR. RUCKET: If may, Your Honor?

8 THE COURT: Sure.

9 MR. RUCKET: Once again, Mr. Dubrow, as he did
10 in his brief, completely ignores our argument. All of
11 the cases we cite, the plaintiff is attacking the
12 process, and the Courts still hold, you cannot change
13 the underlying result. We're not going to relitigate
14 the underlying decision of the panel. That's not what
15 courts do.

16 He can attack the process all he wants in this
17 trial. He is bound to the decision that there was a
18 sexual assault, and therefore, all of his claims against
19 my client fail, because if there is a sexual assault,
20 she could not have defamed the plaintiff. She could not
21 have intentionally inflicted emotional distress, et
22 cetera, et cetera. So he talk about the process all he
23 wants; that's not our argument. He doesn't address it
24 in his brief, and it hasn't been addressed here.

25 Your Honor asked a very interesting question

1 at the beginning of this hearing, which is, if this had
2 gone the other way, and my client had been told no, we
3 don't think a sexual assault occurred, could she come to
4 Court? She could attack the process, but as I point out
5 in footnote eight of my brief, I guarantee you, the
6 plaintiff, Mr. Harris, will be making the exact same
7 argument we're making here today, which is, you had a
8 hearing. They even made a decision. You can't
9 relitigate that underlying argument.

10 I don't want to step on your toes, at all, Mr.
11 Keller, but this Kangaroo Court theory, this is a
12 private college. It's not subject to 14th Amendment due
13 process. This wasn't a Kangaroo Court. It's not a
14 criminal hearing. You're not entitled to criminal
15 procedure and criminal rules and criminal standards.
16 That's what they want to hold St. Joe's to in this
17 hearing.

18 The standard that you get is what is in that
19 handbook. I know you're going to hear about the OCR
20 letter that was adopted by St. Joe's. That's what the
21 hearing -- that's what they agreed to. That's what you
22 get at the hearing. That's what Mr. Harris got. That's
23 what Jane Doe got, got a hearing pursuant to the
24 handbook.

25 You can't -- Mr. Harris wants this Court to

1 rule that he should have been entitled to a criminal
2 hearing. He's not. He got the hearing he was entitled
3 to twice. There's nothing that precluded him from
4 introducing the text messages the first time, if he
5 wanted them. They were introduced the second time.

6 There was no predetermination the second time
7 around, but he got the text messages in. They were
8 discussed. They were found not to say what he thinks
9 they, clearly, say, which we obviously dispute. And the
10 panel found that there was a sexual assault.

11 If this -- when this litigation, you can't go
12 and -- and think of a jury charge, Your Honor. You
13 can't get up in front of the jury and say, well, we're
14 going to decide whether the process was fair for St.
15 Joe's, but ladies and gentlemen, you're not allowed to
16 reconsider the underlying finding, but then, we're going
17 to reconsider the underlying finding, when we rule on
18 the claims against Jane Doe.

19 That's why Reardon, Baine, all the cases cited
20 in my brief, all say the same thing about, you could
21 relitigate the process, but not the underlying results.

22 Thank you.

23 THE COURT: What about the false light
24 argument? Or did you want to add anything to this
25 argument?

1 MR. KELLER: I -- I did, Your Honor, and if
2 I --

3 THE COURT: I'm sorry.

4 MR. KELLER: -- may have -- thank you very
5 much. So lots of responses to plaintiff's argument. I,
6 obviously, disagree with the Kangaroo Court argument,
7 but -- but if we're -- the idea that we're hiding behind
8 something, if we're hiding, we're hiding in plain sight.

9 The handbook says, it's not a criminal
10 process; it's not a civil process. It's an internal
11 administrative procedure. We're not hiding the ball;
12 it's right -- the very contract the plaintiff relies
13 upon, and that he says, he relied upon in coming to St.
14 Joe's, which is the basis for his UTPCPL claim, which
15 for other reasons, we think should be dismissed. It's
16 right in there. There's -- we're not behind anything.

17 We tell people when they come. Here's what
18 this is. This is an internal administrative process.
19 And the idea that because it's actually what -- what I
20 heard is exactly our point. Because these things
21 happened to me, and I'm a male, it must all be biased
22 against men, and it must specifically be biased against
23 men in sexual misconduct proceedings.

24 These Community Standards apply to such things
25 as -- and this is in the handbook, pages 28 to 29 --

1 violating the alcohol policy, using fire to endanger
2 someone else, destroying property, failing to comply
3 with the directions of university personnel, using
4 slurs, videotaping someone without their consent. There
5 are all sorts of things that Community Standards apply
6 to.

7 It's not just, as the plaintiff would lead you
8 to believe, sexual assault or sexual misconduct
9 allegations made by female students against male
10 students. These are the procedures that apply to
11 everybody for everything.

12 If a male student accused a female student of
13 sexual assault, if a male student accused a female
14 student of making an audio recording. If any student of
15 any gender is drinking in violation of the school's
16 policy, these same standards apply to everyone, across
17 the Board. There's no different application one way or
18 the other. There's no allegation that there is.

19 What you heard is, I wish this policy, again
20 -- yet agin -- I wish it had other things in it. I wish
21 it required things that we're used to seeing in criminal
22 court. It's not criminal court. You're not going to
23 have a criminal court proceeding over an internal
24 alcohol policy violation, somebody drinking a beer in
25 the dorm.

1 I mean, these policies apply to everything at
2 St. Joe's, not just accusations of sexual assault and
3 not just accusations of sexual assault by females
4 against males. It would be the same process, if the
5 roles were reversed. It would be the same process if it
6 were some other violation.

7 I also want to just briefly address a few
8 other things that the plaintiff -- plaintiff continues
9 to say the text messages weren't considered. His own,
10 as Your Honor's pointed out, frankly, the amended
11 complaint pleads that they were. He just didn't like
12 when they were, but they were considered.

13 The plaintiff continues to say that we
14 abandoned the quasi-judicial immunity argument. We
15 didn't abandon it. In our reply brief, as we're
16 supposed to do, and required to do by the rules, we
17 limited our reply to new issues that the plaintiff
18 raised. That doesn't mean we abandoned the quasi-
19 judicial argument.

20 We didn't emphasize it anymore, because I
21 think Schanne is right on point. I think that case is
22 right on point. And what that case says is, when we're
23 evaluating statements made in the context of sexual
24 misconduct investigation, we need to determine whether
25 policy concerns, like encouraging open communication

1 without fear of lawsuits outweighs the right of the
2 defamation plaintiff to seek redress.

3 And the Court in that case says, "We think
4 that allegations of sexual misconduct are so important,
5 as a matter of policy, that people should have a
6 privilege in making statements to lead to an
7 investigation, and then the investigation. We need to
8 determine whether policy concerns, like encouraging open
9 communication without fear of lawsuits, outweighs the
10 right of the defamation plaintiff to seek redress.

11 And the court in that case says, we think that
12 allegations of sexual misconduct are so important as a
13 matter of policy, that people should have a privilege in
14 making statements that will lead to an investigation,
15 and then the investigation goes where it goes.

16 But the idea that people have to fear, to Your
17 Honor's point, boy, if I say anything, I might be sued
18 for defamation. That's going to be counter to a public
19 policy which encourages people to report sexual assault,
20 the sexual misconduct.

21 I think the case is on all four, so the reason
22 we describe it more in our reply brief is, because it's
23 -- I think there's much more to say. The last point I
24 did want to -- I did want to mention briefly. There is
25 a distinction in the defamation, and I'm not trying to

1 step on Mr. Rucket's toes, but on the defamation count,
2 what the folks from St. Joe's are alleged to have said
3 is, it's alleged that. That's different.

4 I mean, that's what we did in the course of
5 the investigation, we told people, hey, listen it's
6 alleged that Mr. Harris did this. That -- that's
7 different than he did this or did you know Mr. Harris
8 did that. And to conduct the investigation, we had to
9 let people know what it was we were investigating.

10 If that's -- if that isn't covered by the
11 Common Interest Privilege and isn't an example of quasi-
12 judicial immunity, I don't know what -- I don't know
13 what any institution. But certainly, private
14 institutions are supposed to do, so people make
15 allegations of sexual assault.

16 We say, look, we'd love to -- we'd love to
17 investigate this. We realize you're unhappy and whether
18 it's -- I'll flip it -- it's a male student accusing a
19 female student of sexual assault, and we say, listen,
20 Mr. Harris, Mr. Jones, whoever, you know, we really --
21 we used to investigate these things, but now, we're
22 worried we're going to be sued for defamation if we tell
23 people this allegation's been made.

24 That -- that's not the law. There are
25 protections built into the law, and I think they apply

1 here, and require dismissal of that claim.

2 MR. DUBROW: First of all, Your Honor, I
3 apologize for the Schanne argument. I was looking at my
4 brief with regard to St. Joe. Schanne was brought up by
5 Doe.

6 THE COURT: Right.

7 MR. DUBROW: And he did that on head-on. And
8 I invite the Court to look to page 21 of a response
9 brief to the Doe argument, where we write that Doe's
10 reliance upon Schanne versus Addis is misplaced for two
11 critical reasons. In Schanne, unlike Harris, the
12 plaintiff conceded the defamatory statement related to
13 the quasi-judicial proceedings, so she made the
14 agreement, okay, which we don't do here.

15 Second, Schanne did not address the issue
16 presented in the instant action, "whether a purely
17 private internal disciplinary proceeding constituted
18 judicial -- quasi-judicial proceeding."

19 And Schanne also involved what is called
20 Loudermill theory.

21 THE COURT: Right.

22 MR. DUBROW: And a Loudermill theory is
23 governmental. So therefore, it has characteristics that
24 are quite different than the Harris situation.

25 THE COURT: Okay.

1 MR. DUBROW: Let's talk about it's common
2 interest policy and the privilege and things of that
3 sort. Again, we go back to the flimsiness of this
4 internal proceeding, the flimsiness of the evidence.
5 You know, the issue about the text messages, if you look
6 at this entire case, you look at all the statements that
7 people made, and we don't even know what they are. We
8 haven't been able to -- you know, we're not even being
9 able to open the door further than ajar.

10 THE COURT: Right.

11 MR. DUBROW: We know that what was present for
12 these text messages. We hear the words common sense
13 employed. I read those text messages with common sense.
14 I had other people read these text messages with common
15 sense. The conclusion was universal.

16 Those text messages don't make it to the first
17 hearing. Oh, Mr. Harris could have introduced it. Mr.
18 Harris was a novice here. Mr. Harris wasn't allowed to
19 have any assistance. He wasn't allowed a parent, a
20 representative. Nobody was allowed to participate with
21 him. He's shown a report.

22 He's told that that's the complete report. He
23 goes to the hearing. There's supplemental information.
24 He doesn't have time to review it. He assumes that what
25 he put in there was accurately reported. The next thing

1 you know, he's being found guilty. Now, they talk
2 about, well, St. Joe's says they're alleging it.
3 They're alleging it. No, no. He was found guilty by
4 this panel before the end of the semester.

5 The appeal was not hear and ruled upon until
6 the following semester. Yet, when he's about to return
7 or thinking about the returning, he has all these types
8 of Draconian restrictions. Why is that? Because it's
9 alleged that he committed a sexual assault? No, I don't
10 think so.

11 I think discovery will bear out that he was
12 already convicted of the sexual assault, and that's how
13 come the appeal was ridiculous. It wasn't going to
14 change anything. That die was cast. The contract was
15 breached. The damage was suffered. So therefore, you
16 do have a defamatory --

17 THE COURT: Well, wouldn't there have to be a
18 decision before there can be an appeal?

19 MR. DUBROW: There was a decision. The
20 decision was made in November.

21 THE COURT: Right. In the first semester --

22 MR. DUBROW: He thought --

23 THE COURT: -- against Mr. Harris.

24 MR. DUBROW: Excuse me?

25 THE COURT: The decision was made against Mr.

1 Harris in --

2 MR. DUBROW: Against Mr. Harris, correct.

3 THE COURT: -- the first semester.

4 MR. DUBROW: Against Mr. Harris, yes, correct.

5 THE COURT: So --

6 MR. DUBROW: No, no, no. A decision was made
7 against him --

8 THE COURT: Right.

9 MR. DUBROW: -- during the first semester of
10 his freshman year.

11 THE COURT: Right.

12 MR. DUBROW: His fall semester. Okay. He
13 then files a timely appeal.

14 THE COURT: Right.

15 MR. DUBROW: The decision's still in play.

16 THE COURT: Right.

17 MR. DUBROW: The appeal is supposed to be
18 heard and resolved quickly. It drifted into the
19 Christmas break.

20 THE COURT: Into January?

21 MR. DUBROW: Okay. He, now, goes home,
22 because the school's over. He wants to come back. St.
23 Joe's starts to impose all these ridiculous restrictions
24 on him, because he's already been "convicted" --

25 THE COURT: Right.

1 THE COURT: -- notwithstanding the pendency of
2 the appeal. Are the communications still that it's
3 alleged that he committed a sexual assault or are the
4 communications, no, Mr. Harris did, in fact, commit a
5 sexual assault? And if they were, did, in fact, commit
6 a sexual assault, are they immunized communications? We
7 submit not.

8 And this is just a microcosm of the possible
9 scope of the defamation. We don't know it yet. That's
10 what discovery's all about. We have established
11 sufficient evidence. We have made sufficient
12 allegations in the law to satisfy the rules in Federal
13 court pleadings. We have done it.

14 THE COURT: Okay.

15 MR. DUBROW: They can't simply say that, oh,
16 immunized. No, I think that all of those issues need to
17 be fleshed out to determine whether there isn't
18 immunity. I submit there's not. But I don't think that
19 this Court or any Court, at this stage of the
20 proceedings, could determine, as a matter of law, that
21 immunity bars this claim.

22 And I don't think that this Court or any other
23 Court could determine that truth, as a matter of law,
24 bars this claim. So I submit that the defamation claim
25 against St. Joe's, Kalin and Doe all apply.

1 THE COURT: All right. False light claim?

2 MR. DUBROW: Your Honor, the false light, in
3 the defamation claims, although two separate causes of
4 action are basically the same arguments, and I believe
5 the defense would say the same, as well, is that
6 correct?

7 MR. KELLER: Well -- well, the one -- the one
8 key difference is publicity is important for false
9 light.

10 THE COURT: False light.

11 MR. KELLER: Yeah, you see it in cases of the
12 newspaper article or the TV story or people -- I mean,
13 the -- the only reason this matter has received any
14 publicity is because the plaintiff filed a lawsuit.
15 That's the truth. The -- the publication of the
16 allegations against Mr. Harris were made internally for
17 people at the university, so they could follow through
18 with the Community Standards process. That's it.

19 MR. DUBROW: No. Number one, the publications
20 were not made solely because of this lawsuit. For one,
21 they were published within St. Joseph's University, and
22 I don't know what the extent of the publication. But,
23 also, he's been stigmatized with a record, saying that
24 he was found guilty of sexual assault.

25 He, now, has to go to apply to other colleges.

1 Every one of those college applications says, were you
2 thrown out of another lawsuit -- or school? Were you
3 suspended from another school? It forces him to publish
4 something as this.

5 MR. KELLER: Your Honor, I guess if Mr. Harris
6 is the one that's -- really, the same argument I made to
7 begin with. If he's out in the public, telling people
8 -- two different things. If he's saying this is what
9 was alleged, so it gets back to our threshold argument,
10 and -- and I'm not quite sure where plaintiff went with
11 that last argument.

12 I feel like -- I just wanted to say briefly, I
13 feel like there is an intentional effort to conflate the
14 breach of contract and the process, and I don't like the
15 way this happened and Title 9, in an effort to get past
16 12(b)6. I'm being honest. I think the question was
17 about defamation.

18 The statements that the plaintiff alleges were
19 improper were -- and false light were, we told people
20 that he was alleged of sexual assault. It's true. He
21 was alleged of sexual assault.

22 The only publicity at that point was when we
23 conducted our internal investigation. We didn't go out
24 on the street corner. He didn't put it in the school
25 newspaper, and we didn't go on the news. We would never

1 do that.

2 And if Mr. Harris is telling people, either
3 through a Federal law suit or voluntarily in the public,
4 hey listen, this is what happened, that's not -- that
5 certainly can't be attributed to St. Joseph's.

6 THE COURT: Mr. Dubrow is saying that, but
7 for, St. Joseph's, he wouldn't have to do it, that's
8 your argument, is the right?

9 MR. DUBROW: Part and parcel of it, yes.

10 THE COURT: All right. So what about the
11 intentional infliction of emotional distress?

12 MR. KELLER: Your Honor, there are a number of
13 cases cited in our brief in internal disciplinary
14 proceedings, the Reardon case, the Dempsey versus
15 Bucknell case, and there are a number of others, where
16 courts say, even if you disagree with our process, and
17 even if you think it could have been conducted in a
18 different way, that doesn't give rise to a claim of
19 intentional infliction of emotional distress. There
20 needs to be -- and some of the cases talk about ultra-
21 extreme conduct.

22 So for instance, falsifying a document that
23 says you killed people and sending that around to the
24 prospective employers, that can give rise to intentional
25 inflection of emotional distress.

1 But there's another case -- I'll try to find
2 it very quickly, if I can, Your Honor. Let's see. This
3 is the Hoffman versus Daugert (Ph), which we cite in our
4 brief. In that case, the defendant, in addition to
5 engaging in other alleged tortious conduct, that he sent
6 harassing notes, threatening violence against the
7 plaintiff, explicit violence against the plaintiff.

8 And the Court said, well, that's really bad,
9 but that's not ultra-extreme conduct or outrageous
10 conduct, other than saying -- and again, this goes back
11 to Twombly and Iqbal -- other than saying, the things
12 that St. Joe's or the things that Kalin did are extreme
13 and outrageous. There's no specific, factual
14 allegations to support that.

15 Even if you think it's wrong, which we
16 disagree with or think it's negligent, it's not so
17 extreme or outrageous as to give rise to an IED claim.

18 MR. DUBROW: Now, far be it from me to say
19 that a reasonable prudent person, which is the standard,
20 wouldn't find what St. Joe and Kalin did, extremely
21 outrageous, is, in my view, extremely outrageous. If
22 you take the plaintiff's theory and follow it to its
23 logical conclusion, he was victimized and scapegoated by
24 a failed policy that was improperly implemented.

25 Here is a person who goes through life with a

1 besmirched record that he committed a sexual assault,
2 based upon the accusations made by Jane Doe,
3 notwithstanding her own text messages, based upon
4 Kalin's comparison of Harris to Jerry Sandusky, based
5 upon a hearing that was done, stripped of all
6 fundamental fairness, omitting the text messages, curing
7 it later maybe, probably not.

8 And we're going to say, oh, wait a second,
9 what you did wasn't extremely outrageous. Isn't that
10 something that needs to be fleshed out by the facts? We
11 have stated a strong foundation to support every cause
12 of action asserted against the defendants.

13 And if you accept those allegations as true,
14 can this or any Court say, right now, that that wasn't
15 extremely outrageous behavior, and the Court cannot say,
16 as a matter of law that it was not, the IED claim that
17 stands.

18 MR. RUCKET: What we just heard, Your Honor,
19 was, we want somebody else to evaluate these text
20 messages and make a decision on what they mean. I'm not
21 going to go into what cuddle means here. I've got a
22 completely different view of that, and I think that's
23 supported by my investigation. Let's have somebody else
24 evaluate it. And that's already been done, and that's
25 already been decided, and that is what the are bound

1 with here.

2 So again, as we stated in Count 1, and in my
3 motion to dismiss's primary agreement, all of the
4 claims, including intentional infliction of emotional
5 distress fails.

6 THE COURT: Let me ask about Count 4. I just
7 looked at my notes, and it's something we did talk
8 about. What about standing with respect to Count 4.
9 Count 4 is the Consumer Protection Claim. Does he
10 purchase or lease goods or services?

11 MR. DUBROW: Of course, he bought his -- he
12 pays tuition.

13 THE COURT: He pays tuition?

14 MR. DUBROW: Correct.

15 THE COURT: Does it matter if it's him or his
16 parents with respect to standing on Count 4

17 MR. DUBROW: Not for purposes of the motion to
18 dismiss?

19 THE COURT: Why not?

20 MR. DUBROW: He -- because he alleged he
21 purchased it.

22 THE COURT: Okay. All right. Fair enough.

23 MR. DUBROW: The arrangement between him and
24 his parents --

25 THE COURT: I'm just asking --

1 MR. DUBROW: -- may be sufficient to satisfy
2 that, but the allegation in the complaint is he
3 purchased the services.

4 THE COURT: Okay. I know somebody made an
5 issue of that, so --

6 MR. DUBROW: The defense did.

7 THE COURT: I want to raise it while you were
8 all here.

9 MR. DUBROW: But again, the defendants keep
10 asking this Court to go outside the record. The only
11 thing before the Court is the amended complaint.

12 THE COURT: Well, I understand that. And the
13 attachments to the amended complaint, which is the
14 handbook. No. The only attachment -- that's
15 interesting argument -- the only attachments in the
16 amended complaint were text messages, the complaint
17 referred to portions of the handbook. The defendant,
18 St. Joe, attached the handbook.

19 Now, I'm not going to argue the handbook's not
20 before the Court. We've certainly incorporated enough
21 of it to make it part of it part of the record.

22 THE COURT: I want to make sure we're all on
23 the same page there.

24 MR. DUBROW: Precisely. But the "dear
25 colleague" letter's not part of the record. And the

1 studies and all the other stuff that they want to bring
2 into it is not part of the record.

3 THE COURT: The handbook is.

4 MR. DUBROW: They made a party reference.

5 THE COURT: And you're not disputing that?

6 MR. DUBROW: I make -- the only thing that's
7 at issue on the complaint are those portions of the
8 handbook that we address.

9 THE COURT: Dealing with the disciplinary
10 protocols.

11 MR. DUBROW: Correct.

12 THE COURT: Right, yes.

13 MR. DUBROW: And also -- well, also the issue
14 about saying that's not a contract. But that's --
15 that's an interesting that we could develop later on.

16 THE COURT: Well, no, for the purposes of our
17 evaluation here --

18 MR. DUBROW: The handbook.

19 THE COURT: -- the handbook.

20 MR. DUBROW: The disciplinary procedures.

21 THE COURT: Disciplinary procedures, right.
22 Okay.

23 MR. DUBROW: Yes.

24 MR. KELLER: Your Honor, just very briefly, I
25 want to address two things. So to one, on the Unfair

1 Trade Practices --

2 THE COURT: The standing?

3 MR. KELLER: Yes, that that I think it is
4 alleged in the complaint that he paid, and I would, as I
5 know we all know, if that's not true, we have a Rule 11
6 issue. So I'm not saying it's not, but the idea of well,
7 who -- who care, well it matters to his --

8 THE COURT: Even if he paid a little bit, he's
9 in, right?

10 MR. KELLER: Yeah. Well, I'd have to -- I'd
11 have to -- I don't think there's been any case out there
12 that says that, but if -- if he bought -- there are lots
13 of reasons why I think that claim doesn't apply, which
14 I've already articulated.

15 THE COURT: There are a lot of different ways
16 to finance college in this day and age, and even if
17 Harris paid a portion of it or took a loan to pay a
18 portion of it, that would give him standing, wouldn't
19 it?

20 MR. KELLER: In -- in -- yeah, I think that's
21 right, Your Honor. If -- if he paid it in the
22 expectation that he'd have certain disciplinary
23 proceedings, as we challenge

24 THE COURT: Right.

25 MR. KELLER: But the other thing I want to

1 say, just briefly is, again, and actually every time
2 that the plaintiff argues, they talk about guilty, and
3 they talk about the right to counsel, and they talk
4 about matters of criminal process. That's not what this
5 matter is. That's not what this case is about. The
6 plaintiff again, says, I don't feel like things went
7 they way we thought they should have done.

8 I don't feel like this process is -- we feel
9 like there should be other things in your process that
10 aren't there. That's not what the law requires. That's
11 the thrust of the argument.

12 THE COURT: Give me five minutes. I'll be
13 right back. We're in recess.

14 MR. KELLER: Thank you, Your Honor.

15 (Recess, 11:18 a.m.)

16 THE COURT: All right. So let's turn to FIRE,
17 as it were.

18 MR. DUBROW: Your Honor, could I just add one
19 little thing?

20 THE COURT: Sure.

21 MR. DUBROW: Okay. Perhaps, a good analogy
22 would be to --

23 THE COURT: I'm having trouble hearing you,
24 Mr. -- wait a minute. Wait a minute.

25 MR. DUBROW: Maybe -- maybe a better analogy

1 with regard to the process versus result analysis that
2 I've employed here would have been to a habeas corpus
3 proceeding, because there, you're also addressing a
4 process versus a result.

5 The defendants in this case keep coming to me
6 and saying, come to the Court, you're unhappy with the
7 result. You're unhappy with the result. Any person who
8 is unhappy with the result, is going to come in and
9 challenge it. I haven't seen too many in the court
10 docket involving St. Joe's University. What I suspect
11 is that they've had a number of internal disciplinary
12 proceedings. I don't know what happened during those
13 internal disciplinary proceedings. I don't know what
14 the results are. The reason I don't is, that their own
15 policies and procedures tell us that they destroy all
16 those documents.

17 But what I do know is that -- put the result
18 aside in the Harris case -- what I do know is that the
19 policies and procedures employed were flawed, and the
20 implementation of those policies and procedures were
21 flawed. That's what we bring to the attention to the
22 Court.

23 We could try this entire case, prevail on this
24 motion against us for a motion to dismiss, engage in
25 discovery, defeat a motion for summary judgment and take

1 this case to a jury.

2 THE COURT: But what would that look like?
3 What would that trial, to the jury, look like? I'm just
4 curious. In your own view, what would it look like?

5 MR. DUBROW: In terms of -- I mean, what would
6 it look like, in terms of exhibits mean? I mean --

7 THE COURT: No, no. You're going to have your
8 client testify, give his version of what happened.

9 MR. DUBROW: Yeah.

10 THE COURT: He'll talk about --

11 MR. DUBROW: It would be a lot more than that.
12 And I'm not going to -- I'm not going to show my hand.
13 I will explain at sidebar, but I'm going to --

14 THE COURT: No, no.

15 MR. DUBROW: I have evidence to show -- I have
16 evidence to show that this was clearly an unequivocally
17 consensual act, that this woman's tearful remorse --

18 THE COURT: No, no. I guess what I'm asking
19 is, so we -- se we would -- the underlining claims would
20 be tried, and then, whether St. Joe's provided due
21 process would be tried?

22 MR. DUBROW: What would be at issue here would
23 be the issues raised on my complaint. The issue would
24 be whether or not St. Joe adhered to its contractual
25 duties and obligations. What are the contract terms?

1 THE COURT: Okay.

2 MR. DUBROW: Let's flesh that out through
3 discovery. Now, we have the contract terms. Are those
4 contract terms -- and we were about to hear from FIRE --
5 are those contract terms in accordance with applicable
6 law?

7 So now, what I have is, is St. Joe's setting
8 forth its handbook, its disciplinary procedures that may
9 or may not be in conformance with applicable law, and
10 let's assume they're not. If they're not, they breached
11 a contract of initiative. They imposed an unlawful
12 contract upon a student, who had no say in the matter.

13 MR. RUCKET: While we're being given another
14 opportunity, Your Honor, I would also like to point out
15 that, I think Mr. Dubrow, in his argument earlier,
16 basically admitted or contradicted all of his basic
17 claims in this lawsuit.

18 He made a statement that the fact in this
19 case, as he has pled them are that the sexual -- that my
20 client and his client had sex. She went to the
21 bathroom, then that she came back in a cuddle, that she
22 cuddled with him until 10:00 a.m. in the morning. That
23 was the statement he put on the record, that their facts
24 are that she cuddled with him, after having sex, until
25 10:00 a.m. in the morning.

1 And isn't that the whole point here, that
2 they're trying to make is that cuddling and the text
3 messages were actually a "booty call", an invitation to
4 sex, and can mean nothing other than sex, but on the
5 record, he's admitted that's not accurate. That's not
6 true.

7 This process worked the way it should have.
8 Text messages were not an invitation to sex. And what
9 happened afterwards, adjudicated, it was decided, and
10 you can't get back in front of a jury later and have
11 them redetermine that.

12 THE COURT: Mr. Rucket, let me ask you a
13 question, going back to the immunity issue, in the
14 Schanne case, it's clearly a public entity. It was the
15 Lower Merion School District at issue. Here, we have a
16 private institution, St. Joseph's University is a
17 private institution.

18 Does the -- in Pennsylvania, in this quasi-
19 judicial immunity attach to statements made in the
20 context of a private institution?

21 MR. RUCKET: Well, I have found no cases
22 dealing directly with a private school, but I would
23 argue, Your Honor, that Schanne does apply for public
24 policy purposes --

25 THE COURT: Okay.

1 MR. RUCKET: -- that you're still talking
2 about a government -- I'm sorry, you're talking about a
3 school administrative hearing. A Loudermill hearing is
4 a type of hearing, but it still doesn't turn the school
5 into a governmental entity.

6 THE COURT: Right. Sir, how are you?

7 MR. COHN: Good. Thank you for having us
8 here today.

9 THE COURT: Sure. So give me your perspective
10 on this case?

11 MR. COHN: Well, Your Honor, we were here for
12 only the limited purpose of insuring that the
13 defendant's argument regarding that they had to do it
14 this way, because that's what the "dear colleague"
15 letter required?

16 THE COURT: Right.

17 MR. COHN: We wanted to refute that argument.
18 That's FIRE's sole interest in the case. We don't have,
19 you know, a position on whether or not Mr. Harris' due
20 process rates were ultimately, you know, violated. So
21 that, the Court will have to look at what due process
22 procedures were provided him and whether or not that
23 ultimately met the obligations, and you'll have to
24 compare what was missing versus what you ultimately
25 think is what they should have done to make the process

1 meaningful and fair.

2 We weren't here to weigh in on that question,
3 but looking at the totality of each of those things and
4 checking them off. Was it here? Was it there? It
5 matters.

6 THE COURT: Okay. Anything else, gentlemen?

7 MR. KELLER: No, Your Honor.

8 MR. DUBROW: What if it went the other way?
9 What would Jane Doe have done?

10 THE COURT: That was my question.

11 MR. DUBROW: Precisely. There was also an
12 argument advanced by Jane Doe. This isn't about what
13 Jane Doe would have/would not have done. We have four
14 pages of a useless statement by Jane Doe about what she
15 believed happened. That's not what's before this Court.
16 What is before this Court is what happened to Harris;
17 what these policies were and how they were implemented.

18 And we submit that our complaint is sufficient
19 to get past this stage of the proceedings, get into
20 discovery, and if we're back in front of this Court on
21 dispositive motions from either side of the caption, we
22 could address it there with greater facts.

23 THE COURT: All right. Anything else,
24 gentlemen?

25 MR. RUCKET: Your Honor, this is about my

1 client being date raped and having two hearings at her
2 school about it. It's not just about Mr. Harris. It's
3 about my client, as well.

4 MR. KELLER: Your Honor, we'll address the
5 "dear colleague" in our responsive brief.

6 THE COURT: How much -- when do -- and I know
7 I caught you, maybe, off time today, but how much time
8 do you need to --

9 MR. KELLER: Today was a little more
10 aggressive than I was anticipating, Your Honor, but we
11 can get it done today, if you like.

12 THE COURT: No, no, no. You don't have to
13 file it today. Tell -- whatever you need. All right.

14 MR. KELLER: A week? One week?

15 THE COURT: A week.

16 MR. KELLER: One week, but --

17 THE COURT: And after that's filed, briefing
18 is closed in this, right?

19 MR. KELLER: That's it, Your Honor.

20 THE COURT: Okay.

21 MR. KELLER: And -- and the point -- we will
22 get a brief in, but the point is, there are lots of
23 reasons why we think our policies and procedures are
24 okay, and we say, oh, and by the way, this "dear
25 colleague", but the idea that the "dear colleague"

1 letter is why we did what we did, I mean, that's -- it's
2 -- it's really -- it's almost irrelevant. You know,
3 it's very relevant to FIRE. I understand that. That's
4 why they're here. But for our -- our disciplinary
5 process, we've explained in detail, in our motion to
6 dismiss, all the reasons why we think our policies and
7 procedures are acceptable, appropriate, consistent with
8 the case law, not the sorts of things that Federal
9 courts are supposed to be relitigating, and that's
10 really the focus of the case.

11 THE COURT: All right. And you'll get back to
12 me on the 25th with respect to your filings, and then
13 the --

14 MR. KELLER: Yes.

15 MR. DUBROW: Well -- well, Your Honor --

16 THE COURT: -- hold on --

17 MR. DUBROW: I'm sorry.

18 THE COURT: -- and then the briefing is
19 closed. Yes?

20 MR. DUBROW: My only suggestion is this,
21 perhaps to ease the burden upon St. Joseph's to submit
22 this brief. If St. Joe's taken the position that, you
23 know, we really don't need to talk about that "dear
24 colleague" argument, if the Court, at this time, would
25 say, I am not going to consider the "dear colleague"

1 component to the St. Joe's argument, then it need not
2 consider the FIRE position, at this time, either.

3 THE COURT: Well, let St. Joseph's decide how
4 they want to defend themselves.

5 MR. DUBROW: Very well. All right. So we are
6 adjourned. Thank you, everybody.

7 MR. KELLER: Thank you, Your Honor.

8 MR. RUCKET: Thank you, Your Honor.

9 (Proceedings concluded 11:42 a.m.)

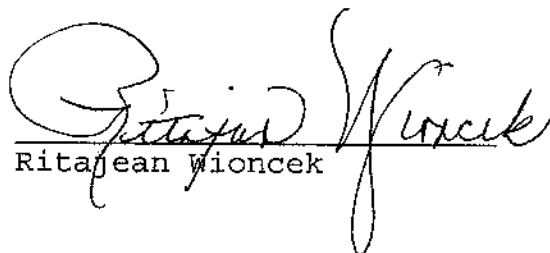
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CERTIFICATION

I, Ritajeon Wioncek, do hereby certify that
the foregoing is a true and correct transcript from the
electronic sound recordings of the proceedings in the
above-captioned matter.

1-22-14

Date


Ritajeon Wioncek